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Supreme Court of the United States

OCTOBER TERM, 1964

No. 725

JACOB MOLINAS,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

Introduction 1

POINT I

Petitioner's Fifth and Sixth Amendment rights, as applied to state criminal trials by the Fourteenth Amendment, were violated by the admission in evidence of the surreptitiously obtained incriminating tape recording 3

POINT II

The petitioner's Fourth Amendment rights, as applied to state criminal trials by the Fourteenth Amendment, were violated when the agent of the prosecutor gained entry into petitioner's private office by misrepresentation for the purpose of extracting self-incriminating statements from the petitioner which were recorded on a concealed tape recorder 5

POINT III

Where a criminal jury trial has been in progress for more than a month and almost 3,000 pages of testimony taken, its interruption for five weeks, during which time the jury is dispersed and not subject to the control of the court, so completely destroys the continuity of the trial as to deprive petitioner of his constitutional right to due process of law and a fair trial, and it was error not to grant his timely motion for a mistrial 6

CONCLUSION 8

PAGE

Citations to Cases

Carnley v. Cochran, 368 U. S. 506, 513 4

Escobedo v. United States, 378 U. S. 478 3

Gideon v. Wainwright, 372 U. S. 335 5

Lopez v. United States, 373 U. S. 427 5

Malloy v. Hogan, 378 U. S. 1 5
Mapp v. Ohio, 367 U. S. 643 5
Massiah v. United States, 377 U. S. 201, 206 4
McNabb v. United States, 318 U. S. 332, 347 2

On Lee v. United States, 343 U. S. 747 5
Ossenkop v. State, 86 Neb. 539, 126 N. W. 72 7

People v. Donovan, 13 N. Y. 2d 148 3
People v. Dorado, 40 Cal. Rptr. 264, 268 4

Sullivan v. Aliquippa & S. R. Co., 57 F. Supp. 353 7

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Introduction

In his "Statement" (Petition, pp. 5-10) petitioner has set forth in detail, and with complete record references, the facts with respect to the manner in which the District Attorney induced Reed to cooperate and the surreptitious manner in which the self-incriminating tape recording was obtained. Respondent apparently concedes the truth of all of the facts in petitioner's "Statement", for he has not challenged or disputed any fact or reference recited therein.

Respondent's "Introduction" (Resp. Br., pp. 2-5) deals solely with the irrelevant facts of the substantive nature of the crimes with which petitioner was charged. It omits entirely any reference to the facts which are relevant to a

consideration of the important questions of criminal procedure and constitutional law presented by this application.*

As this Court has observed, however, "The history of liberty has been largely the history of observance of procedure safeguards" (*McNabb* v. *U. S.*, 318 U. S. 332, 347).

Since petitioner's constitutionally guaranteed rights are in nowise lessened by reason of the nature of the crime which he is charged to have committed, an extended reply to respondent's tactic is unnecessary. We merely point out, however, that it was obviously intended to divert this Court's attention from respondent's own illegal and improper conduct and respondent's violation of petitioner's constitutional rights.

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* At p. 7 of Respondent's Brief, respondent cavalierly dismisses the entire subject with the brief misleading assertion that: "Reed, however, after consulting with Legal Aid attorneys, decided to cooperate with the district attorney, and agreed to carry a recording device on his person. Reed then telephoned Molinas and was invited to the defendant's law office."

POINT I

Petitioner's Fifth and Sixth Amendment rights, as applied to state criminal trials by the Fourteenth Amendment, were violated by the admission in evidence of the surreptitiously obtained incriminating tape recording.

[Answering Resp. Point I, pp. 6-9]

We take the liberty of replying briefly to the following assertions of respondent:

(1) *Respondent asserts:* "Clearly, of course, Molinas, who had not even been arrested, is not in the same position as an indicted defendant, and as the police could freely question Molinas, so too could they use an agent" (Resp. Br., p. 7).

Petitioner's comment: This statement begs the very question presented for the Court's consideration. We submit that the police were not at liberty to question petitioner, directly or through the use of a secret agent, in the absence of counsel (*Escobedo* v. *Illinois,* 378 U. S. 478; *People* v. *Donovan,* 13 N. Y. 2d 148).

(2) *Respondent asserts:* "Molinas was not arrested. He was not subjected to a lengthy interrogation. No lawyer was sidetracked from seeing him. He asked for no lawyer, nor was he denied one" (Resp. Br., p. 8).

Petitioner's comment: While petitioner was not arrested, he was concededly the prime target of the prosecutor's investigation, which was clearly accusatory in nature. That petitioner's rights were not violated because the interrogation was not "lengthy" is patently specious. Obviously, petitioner did not request the presence of his counsel be-

cause "he did not even know that he was under interrogation by a Government agent" (*Massiah* v. *U. S.*, 377 U. S. 201, 206). Moreover, "where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request" (*Carnley* v. *Cochran*, 368 U. S. 506, 513). As the Supreme Court of California has recently held in *People* v. *Dorado*, 40 Cal. Rptr. 264, 268: "We find no strength in an artificial requirement that a defendant must specifically request counsel; the test must be a substantive one: whether or not the point of necessary protection for guidance of counsel has been reached."

(3) *Respondent asserts:* ". . . the fact that Molinas was himself a lawyer is of prime importance" (Resp. Br., p. 8).

Petitioner's comment: Respondent obviously does not concur with the adage that "a lawyer who represents himself has a fool for a client." In any event, although petitioner was a member of the bar, he did not practice criminal law and was entitled to advice from a specialist in this field.

POINT II

The petitioner's Fourth Amendment rights, as applied to state criminal trials by the Fourteenth Amendment, were violated when the agent of the prosecutor gained entry into petitioner's private office by misrepresentation for the purpose of extracting self-incriminating statements from the petitioner which were recorded on a concealed tape recorder.

[Answering Resp. Point II, pp. 9-13]

We respectfully refer the Court to our previous discussion at pp. 14-18 of the "Petition" and, particularly, to p. 17, where a comparison of the case at bar with the *Lopez* case appears.

Since five Justices of this Court have expressed the view that *On Lee* v. *U. S.*, 343 U. S. 747, was erroneously decided and should no longer be regarded as controlling authority, we respectfully submit that it should now be overruled. This Court has not hesitated to overrule its prior decisions when the preservation of a defendant's constitutional rights so requires (*Mapp* v. *Ohio*, 367 U. S. 643; *Gideon* v. *Wainwright*, 372 U. S. 335; *Malloy* v. *Hogan*, 378 U. S. 1).

POINT III

Where a criminal jury trial has been in progress for more than a month and almost 3,000 pages of testimony taken, its interruption for five weeks, during which time the jury is dispersed and not subject to the control of the Court, so completely destroys the continuity of the trial as to deprive petitioner of his constitutional right to due process of law and a fair trial, and it was error not to grant his timely motion for a mistrial.

[Answering Resp. Point III, pp. 13-18]

In his brief in opposition (p. 16), the District Attorney urges that "although more protracted, the delay occasioned by the judge's illness, *differs only in degree* from the many evenings and weekends that the jurors spent at home during the course of the trial (emphasis added). Surely, if instead of a five week interruption, this trial had been delayed for six months or for one year, even the District Attorney would no longer suggest that this was a mere difference "only in degree" from overnight and weekend adjournments.

Obviously, at some point a sufficiently great difference quantitatively becomes a difference qualitatively. It is essential that this Court consider this question and state at what point the interruption of a criminal jury trial becomes so prejudicial to the defendant by the mere lapse of time that a mistrial must be granted as a matter of constitutional law.

It is no answer to say, as does the District Attorney (Resp. Br., p. 15), that the prejudice which resulted from the long interruption was eliminated by defense counsel's opportunity "to read to the jury any portion of the record which it was felt necessary to recall" and the fact that counsel's summation "could be as lengthy as necessary in

view of the circumstances." To adequately insure petitioner's right to due process and a fair trial, the jury would have had to be presented with virtually all of the prior testimony. Short of a new trial, this would have been impossible. Additionally, as petitioner's trial counsel noted at the time of his motion for a mistrial (2924-25):

> "Mr. Evseroff: I intend to sum up, Your Honor, but unfortunately it is not possible for me to go over each and every nuance and inference created in cross-examination with respect to the questions, with respect to the answers, with respect to the manner in which the witnesses answered; for one very good reason: I do not have the minutes, and I do not have the minutes because when I asked my client to buy the minutes, he told me he could not afford to."

Finally, the cases cited by the District Attorney at p. 17 of his brief, are clearly inapt, and his discussion of these cases conveys a completely misleading impression of their actual holdings.

In *Ossenkop* v. *State,* 86 Neb. 539, 126 N. W. 72, the adjournment occasioned by the fact that several of the defendant's witnesses were quarantined on account of smallpox, occurred four days after the commencement of the trial and not, as here, after five weeks of testimony. Moreover, as appears at p. 76, the Court informed the jurors of the reason for the postponement and admonished them at great length with respect to the gravity of the situation and their responsibilities. In the instant case, the jurors were excused with the perfunctory admonition, "Do not talk about the case. Do not form or express any opinion. You may retire" (2906).

In *Sullivan* v. *Aliquippa & S. R. Co.,* 57 F. Supp. 353, *a civil case,* the continuance necessitated by the Trial

Judge's illness *was agreed to* by both counsel. With respect to the granting of such a continuance, the Court noted (p. 354) that:

> "Such a procedure should not be followed generally. It should be done only in cases where the facts are of such a nature as to require the same to be done; and even then, *it should not be done if either side would be prejudiced thereby or unless the parties and the Court approve of such a course*" (emphasis added).

CONCLUSION

For the reasons stated herein and in the petition heretofore submitted, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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